

BEFORE THE  
**Federal Communications Commission**

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE OF THE SECRETARY

In the Matter of

The Implementation of  
Section 309(j) of the  
Communications Act

Competitive Bidding

PP Docket No. 93-253

To: The Commission

**REPLY COMMENTS OF GEORGE E. MURRAY**

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## Summary

George E. Murray, an African-American entrepreneur with substantial telecommunications experience, is filing reply comments supporting the use of preferences in the competitive bidding process for Personal Communications Services (PCS). Numerous comments were filed on this issue by a variety of interested parties. These comments express strong support for implementing a preference system that includes a combination of both set-aside spectrum and economic preferences. Such preferences are necessary to foster meaningful participation by minority-owned businesses in the provision of PCS.

The comments, viewed as a whole, support the conclusion that preferences must apply to non set-aside as well as to set-aside spectrum. And, the Commission should adopt the many creative suggestions made by commenters on methods of encouraging strategic alliances between minority businesses and major industry players.

Many knowledgeable commenters agree with Mr. Murray that minority telecommunication businesses generally face more entry barriers than do any of the other preference categories. Since not all Designated Entities have to overcome identical obstacles, they need not all receive identical preferences. The most favorable treatment should be accorded to minority businesses.



entrepreneur with substantial business experience in both telecommunications and non-telecommunications fields. Mr. Murray commented in the proceeding to help the Commission fashion an auction procedure for broadband PCS services that will achieve the congressional mandate of providing minority-owned businesses with the opportunity to participate in the provision of spectrum-based services.

2. A diverse group of other interested parties also has taken the time to submit detailed comments on the issue of preferences for "Designated Entities."<sup>2/</sup> Many of these are from individuals and groups who qualify as, or represent, minorities who will be interested in pursuing communications licenses if the auction procedures ultimately present meaningful opportunities. Taken as a whole, this outpouring of interest by Designated Entities clearly demonstrates that the Commission has a real opportunity to diversify the ownership of communications properties in the United States. But the Commission can only realize this opportunity by taking bold actions to grant meaningful preferences to previously under-represented groups.

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<sup>2/</sup> See, e.g., Comments of Oye Ajayi-Obe, Alliance for Fairness and Viable Opportunity, Alliance Telecom, Inc., American Wireless Communication Corp., American Women in Radio and Television, Inc., Association of Independent Designated Entities, Call-Her, Council of 100, Lightcom International, Inc., Minority Business Enterprise Legal Defense and Education Fund, Inc., Minority PCS Coalition, National Association of Black Owned Broadcasters, National Association of Minority Telecommunications Executives & Companies, Arlene F. Strege, United Native American Telecommunications, Inc., Venus Wireless, Inc., and Windsong Communications, Inc.

## **II. The Commission Should Adopt A Broad Range of Preferences Including Both Spectrum Set-Asides and Economic Incentives**

3. The Murray Comments advocated the adoption of a broad range of preference mechanisms to ensure that the statutory objective of the Omnibus Budget Reconciliation Act of 1993 (the "Budget Act")<sup>3/</sup> is fulfilled.<sup>4/</sup> Other commenters reach similar conclusions, noting that the severe capital formation problems facing many small and minority-owned businesses require that any preferences adopted include not only set-asides, but also a wide variety of economic incentives.

4. Specifically, several groups suggest that the Commission require a lower up-front payment and deposit from Designated Entities wishing to participate in auctions than from other applicants.<sup>5/</sup> Similarly, numerous comments express support

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<sup>3/</sup> 47 U.S.C. § 309(j)(4)(D).

<sup>4/</sup> Murray Comments at 14.

<sup>5/</sup> Since capital formation is such a serious problem for minority firms, the National Association of Minority Telecommunications Executives and Companies ("NAMTEC") advocates granting Designated Entities a fifty percent discount on the up-front payment. This reduction would lower a significant barrier to minority participation, yet the amount remains high enough to ensure that only serious and qualified bidders participate in the auction process. NAMTEC further suggests that this fee should be paid at the auction site rather than with the application. This would give the Designated Entity more time to arrange for financing, and also allow it to earn interest on the money up until the date of the auction. NAMTEC Comments at 20 - 21. Similarly, the Council of 100 suggests that Designated Entities be permitted to pay the entry and deposit fees through installment payments. Council of 100 Comments at 3. FiberSouth recommends that Designated Entities should be  
(continued...)

for allowing Designated Entities to buy spectrum using bidding discounts<sup>6/</sup> and installment payments,<sup>7/</sup> as well as for granting tax certificates, and reduced interest rates so that the government does not make money on "loans" to minorities.<sup>8/</sup>

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<sup>5/</sup>(...continued)

at 6. Tri-State Radio Company ("Tri-State") also supports reduced or eliminated deposit payments for Designated Entities. Tri-State Comments at 15 - 16.

<sup>6/</sup> United Native American Telecommunications, Inc., Palmer Communications, the Minority PCS Coalition and other groups support bidding discounts ranging from 10 to 25 percent for minority applicants. The National Association of Black Owned Broadcasters, Inc. (NABOB) supports adding a 25 percent bonus to minority bids. See NABOB Comments at 10 - 11.

<sup>7/</sup> Venus Wireless, Western Wireless, the Small Business PCS Association, American Wireless Communication Corporation (AWCC) and NAMTEC all support allowing a Designated Entity to pay for its bid over the term of the license, a ten year period. See also NABOB Comments at 11.

<sup>8/</sup> Venus Wireless, Western Wireless and the Small Business PCS Association support offering an interest rate of prime plus one percent. But Windsong Communications, Inc., CalCell Wireless, Inc. ("CalCell"), Cook Inlet Region, Inc., and the Small Companies of Louisiana requested a still lower rate, arguing that the government should not make a profit on the interest payments charged for spectrum sales. The parties argue that this would violate the congressional directive which precludes basing any regulations "solely or predominantly" on the expectation of Federal revenues. Furthermore, CalCell argues that the Commission should consider the ability of large corporations to borrow at rates below prime using debt instruments as commercial paper. These parties, therefore, suggest that the interest rate charged to minorities and women should equal the rate at which the government borrows from the Treasury. Similarly, NAMTEC suggests that the rate should be tied to the federal funds rate rather than the prime rate. See NAMTEC Comments at 15 - 16.

5. The comments of the National Association of Black Owned Broadcasters ("NABOB") are particularly noteworthy. NABOB offers a comprehensive proposal under which minority groups would have a 25 percent bonus added to their bid. After an initial 10 percent deposit, a winning minority bidder could pay the balance of the bid, interest free, over a seven year period beginning on the date the system receives its first revenues from customers. Investors could also obtain a tax certificate for the sale of a less than controlling interest in a minority-owned and controlled entity.<sup>9/</sup>

6. CalCell offers another creative approach in its Infrastructure Preference. This preference would be available, regardless of race or gender, to any applicant who makes "a commitment to rebuild America's inner cities by locating in designated enterprise zones, and employing and training socially and economically disadvantaged workers."<sup>10/</sup>

7. As an experienced minority entrepreneur, George Murray has first hand knowledge of the often subtle obstacles facing minority businesses. He therefore supports implementing the array of approaches advocated in the aforementioned comments. The Commission must utilize a combination of the above mentioned economic preferences to create meaningful opportunities for minority businesses, because individually, these mechanisms will not effectively permit minority business to accumulate the

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<sup>9/</sup> See NABOB Comments at 11.

<sup>10/</sup> See CalCell Comments at 2, 9 - 13.



massive amounts of credit and financing that are necessary to create real investment opportunities.<sup>11/</sup>

**III. Economic Preferences Should Apply to  
Both Set-Aside and Non Set-Aside Spectrum**

8. Some commenters, including General Communications, Inc. and McCaw Cellular Communications, Inc. ("McCaw"), support the general concept of economic preferences, but argue that any liberalized payment terms granted to Designated Entities should not apply outside the set-aside blocks. However, to fulfill the explicit Congressional directive to create opportunities for Designated Entities, the Commission must adopt an expansive approach to the preference issue. Mr. Murray therefore joins NABOB, NAMTEC, Lightcom International and others in urging that economic preferences be made available to women and minorities whether they are bidding for the set-aside or non set-aside spectrum.<sup>12/</sup>

9. This approach is especially important in light of the inferior nature of the blocks of spectrum that have tentatively been identified for set asides.<sup>13/</sup> The two blocks

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<sup>11/</sup> See also NABOB Comments at 8 - 9.

<sup>12/</sup> See NABOB Comments at 9 - 10; NAMTEC Comments at 17 - 18; and Lightcom International, Inc. of Washington, D.C. ("Lightcom") Comments at 2.

<sup>13/</sup> Tri-State Radio ("Tri-State") generally supports set-asides for Designated Entities, but it cautions that as currently structured, the Designated Entities will be  
(continued...)

of spectrum earmarked for bidding by Designated Entities are smaller in terms of spectrum bandwidth and geographic coverage area than certain other non set-aside blocks.<sup>14/</sup> Thus, even if the set-aside blocks were easier to obtain -- which is doubtful<sup>15/</sup> -- the inherent disadvantages of these blocks will be difficult to overcome.

10. Radio spectrum is a public resource and should not be divided in a manner that subtly, but systematically, excludes minorities from the best and most profitable portions of spectrum.<sup>16/</sup> Capital formation is one of the major problems

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<sup>13/</sup>(...continued)

relegated to lower quality PCS systems with a lesser economic value. Additionally, the Comments of the People of the State of California and the Public Utilities Commission of the State of California ("CPUC") also agree that there should be set-aside opportunities for all sized blocks, including the largest ones. See CPUC Comments at 2 - 3.

<sup>14/</sup> The set-aside blocks are limited to BTA coverage of 20 MHz and 10 Mhz respectively. In contrast, two non set-aside blocks of 30 MHz are available on an MTA basis.

<sup>15/</sup> The total number of parties eligible for set-aside spectrum is quite staggering once you aggregate all of the small businesses, minority-owned businesses, women-controlled businesses and rural telephone companies in the country. Mr. Murray expects competition for these licenses to be fierce, perhaps more so than for some of the non set-aside spectrum. The number of commenting parties who have expressed an intention to apply for licenses as designated entities is indicative of the high level of interest.

<sup>16/</sup> Much of the minority under-representation which currently exists in the telecommunications industry is attributable to the fact that many of the nation's principal telecommunications licenses were assigned during periods of overt discrimination against racial minorities. Restricting minority preferences to set-aside blocks would simply perpetuate minority under-

(continued...)

facing women and minorities, and this barrier exists regardless of whether an entity is bidding for set-aside or non set-aside spectrum. As Cook Inlet Region argues, offering installment payments, tax incentives, and other incentives to Designated Entities on all spectrum blocks will help to avoid relegating Designated Entities to highly insulated service opportunities in the set-aside 20 and 10 MHz blocks. Accordingly, the Commission must provide that any economic preferences adopted will be available to minorities whether or not they are bidding on the set-aside spectrum.

**IV. The Commission Must Affirmatively Encourage  
Alliances Between Established Communications  
Companies and Minority Businesses**

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11. The Notice requested comment on whether consortia that include Designated Entities should be afforded preferences in the same manner as are entities wholly owned and/or controlled by Designated Entities. A variety of comments support the economic and set-aside preferences only as long as the Commission imposes strict safeguards to ensure that the adopted measures help only Designated Entities.<sup>17/</sup> For example, Corporate Technology Partners contends that to prevent large companies from

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<sup>16/</sup>(...continued)

representation, though through more subtle means. This result would be ironic, and highly inappropriate, since it would be promulgated pursuant to a Congressional directive to "create" and "enhance" economic opportunities for minority firms.

<sup>17/</sup> See e.g. McCaw Comments at 18 - 19, 21 - 22.

creating Designated Entity "fronts", the Commission should prevent a consortium from receiving any preferences unless all the consortium members are eligible for bidding as Designated Entities.

12. These restrictive views are not well considered. Although safeguards are necessary, the Commission must ensure that the effort to eliminate minority "fronts" does not unnecessarily restrict natural and desirable growth of minority firms. While this requires a delicate balancing test, achieving the proper balance is especially important to prevent minority firms from being relegated to a "spectrum ghetto." The Corporate Technology Partners interpretation is therefore too restrictive as it prevents minority firms from establishing desirable and benign business ties with large, well-capitalized telecommunications companies.

13. The purpose of the preference program is to provide minority companies with opportunities that provide access to the economic mainstream. One of the most effective ways the Commission can achieve this is to provide incentives for mainstream firms to seek out substantial and meaningful business ties with minority firms. Creating overly restrictive limits on consortia, therefore, would undermine the ultimate goal of the program, and permanently preclude minority firms from forming

alliances with the companies from whom they could gain the most.<sup>18/</sup>

14. Several commenters made useful policy suggestions on how the Commission could strike a proper balance between safeguards and growth. For example, NAMTEC advocates creating a "percent participation benefit" under which a consortium would receive preferential treatment based on the percentage of minority involvement in its group.<sup>19/</sup> This type of arrangement would allow a minority firm to pool its resources with a larger firm and, thereby, increase its access to markets, capital, and service opportunities. In addition, the Commission could allow some exemptions to spectrum caps for joint ventures with minority business. For example, Bell Atlantic suggests waiving the cellular attribution and eligibility rules for noncontrolling partnerships with Designated Entities.<sup>20/</sup>

15. When the Commission formulates rules to prevent "unjust enrichment", NABOB properly cautions that the Commission

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<sup>18/</sup> Bell Atlantic Personal Communications, Inc. ("Bell Atlantic") notes that the benefits of affiliation with larger companies include: (1) exposure to technical and market experience; (2) the receipt of training and assistance in the areas of business management, technical development and capital formation; and (3) increased access to capital markets. Bell Atlantic Comments at 15 - 16.

<sup>19/</sup> See NAMTEC Comments at 19 - 20. Under this proposal, if there were 20 percent involvement by Designated Entities within the consortium, then only 20 percent of the price would be eligible for installment payments or other economic preferences.

<sup>20/</sup> See Bell Atlantic Comments at 15 - 17.

should not assume that a joint undertaking by a non-minority entity and a smaller minority-owned entity is a "front" unless the larger entity enters into the venture with a predetermined ability to: (1) buy out the smaller entity's interest; (2) within less than three years; (3) at a price substantially lower than the value that should be attributed to the minority owner's interest.<sup>21/</sup> Instead of barring preferences to all minority combinations with non-Designated Entity consortia, the Commission could adopt ownership rules which require that the Designated Entity hold a certain minimum percentage of the enterprise.<sup>22/</sup> Mr. Murray supports these comments.

V. All Designated Entities Are Not Similarly Situated

16. Congress has mandated that the Designated Entities must have an "opportunity to participate" in offering spectrum services. While the statute lists all the enumerated groups

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<sup>21/</sup> See NABOB Comments at 13 - 14.

<sup>22/</sup> NAMTEC supports an ownership requirement with a 20 percent minimum minority equity interest, and a 50.1 percent minimum minority voting interest. See NAMTEC Comments at 24 - 25. Similarly, CalCell recommends that minorities have: (1) clear structural control over the applicant (e.g. 51 percent voting control in corporate entities, bona fide general partnership status in limited partnerships); (2) a minimum equity stake in the applicant (not less than 20 percent); (3) have the applicant certify that it meets eligibility requirements, and be subject to civil, criminal and administrative sanctions if the certification is found to be false. See CalCell Comments at 27. See also Cook Inlet Region, Inc., Cellular Service, Inc., Iowa Network Services, Windsong Communications, and National Telephone Cooperative Association.

together, it does not indicate that each group must be afforded the same type of treatment.<sup>23/</sup> Thus, the Commission requested comment on whether it would be appropriate to address the specific concerns applicable to each entity using different types of preferences. Not surprisingly, comments by "small businesses" and rural telephone companies, such as LuxCel Group, Inc. ("Luxcel") and Cellular Services, Inc., generally expressed wide support for extending bidding discounts and preferences equally to all Designated Entities.<sup>24/</sup> PMN, Inc. ("PMN") also asserts that "[a]ssuming that the designated entities are of similar economic viability", quantification of the economic deficiencies, beyond that provided by Congress "could result in artificial and unnecessarily complex regulations."<sup>25/</sup>

17. However, to assume that all Designated Entities are of "similar economic viability" begs the core question. Not all of the preference groups are similarly situated. Minorities, for example, face barriers that are fundamentally different, and more difficult to surmount, than those facing rural telephone companies and small businesses.<sup>26/</sup> Minorities also face steeper

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<sup>23/</sup> Notice at paragraph 75.

<sup>24/</sup> See LuxCel Comments at 5; Cellular Service Comments at 6 - 9.

<sup>25/</sup> PMN Comments at 5.

<sup>26/</sup> See Report of the FCC Small Business Advisory Committee to the Federal Communications Commission Regarding GEN Docket no. 90-314, submitted September 15, 1993 ("SBAC Report") at 4 - 5.

barriers than do women.<sup>27/</sup> As a result, minorities are more under-represented in the communications industry than are any of the other Designated Entities, including women. Minorities should, therefore, receive the most preferential treatment under the policy because, in this instance, treating all Designated Entities as equals would ignore important differences between the groups, and thereby effectively deny minorities an equal "opportunity to participate" in the provision of PCS services.

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<sup>27/</sup> "Over the past several years, women and minorities have increasingly found themselves pitted against each other for inadequate "set-asides"... The reality is that substantial differences exist in the type of disabilities faced by women and racial minorities, not the least of which is the pace at which opportunity may become available and the relative ability to exploit those opportunities that do appear. Women have not, to the same extent, been excluded from or underrepresented in colleges and other training programs on the same scale as racial minorities and are [therefore] not equal competitors when the barriers are finally reduced or eliminated." U.S. Commission on Civil Rights, Consultations on the Affirmative Action Statement of the U.S. Commission on Civil Rights, Vol. 1, 1981 at 4. For example, between 1982 and 1987, the number of women-owned businesses increased 58 percent from 2,612,621 million to 4,112,787 million. These businesses account for about 30 percent of all U.S. businesses. By contrast, in 1987, the total number of black owned businesses numbered only 424,000, about 3 percent of all U.S. businesses. The total receipts of women-owned businesses reached \$278.1 billion in 1987; while that of black owned businesses was just over 1 billion. Women are clearly making bigger and faster advances in business ownership than are minority men. But the gains made by "women" also largely exclude minority women. In 1982, white women owned 92.5 percent of all women owned businesses. Black women owned only 3.8 percent. See U.S. Census Bureau, Summary of 1987 Minority Business Census, July 1991 (contained in American Women In Radio and Television Inc., Comments at Exhibit 2 pp. 1 - 3, and Exhibit 3.)



**A. To Create a "Level Playing Field" Minorities  
Should Receive Special Preferences**

18. Providing identical preferences to all Designated Entities would further exacerbate the disparity in the representation of minority firms. Since Designated Entities will be bidding against each other for set-aside spectrum, it is crucial that the preference policy seek to equalize the relative capabilities of the Designated Entities. Otherwise, the new regulations only serve to extend current patterns of under-representation and discrimination into a new service area.<sup>28/</sup>

19. Accordingly, NABOB urges that the tax certificate policy should not be extended to any other Designated Entity. "To do otherwise would lead, ... to the erosion of the Policy as a whole."<sup>29/</sup> NABOB would also give minority bidders a 25 percent bidding bonus. NABOB concludes that this approach is warranted because the need and justification for special programs for African-Americans is more fully documented in Congressional, judicial, and Commission action than of other Designated Entities.<sup>30/</sup>

20. Similarly, the Minority PCS Coalition ("MPC") advocates that, while the Commission should set aside blocks of

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<sup>28/</sup> "Once race-related discriminatory practices are built into regulations, . . . they are not likely to be altered by . . . outside pressures for change or even by . . . court suits." Id. at 50.

<sup>29/</sup> NABOB Comments at 14 - 15.

<sup>30/</sup> Id.

spectrum for all Designated Entities with respect to broadband PCS, minorities should receive their own separate block of spectrum, distinct from the blocks for rural telephone companies, women or small business.<sup>31/</sup> And, CalCell correctly points out that rural telephone companies, unlike minorities, have access to capital markets by virtue of their monopoly position as the only local provider of telephone service in their service area. The only disadvantage rural telephone companies have versus other telephone companies is their size. And since rural telcos are typically assured of profitability through rate of return regulation, CalCell concludes that few preferences are necessary to ensure that these companies have an opportunity to participate in PCS.<sup>32/</sup> Therefore, CalCell suggests that rural telephone companies should be limited to bidding on spectrum in the 10 MHz band set-aside for Designated Entities.<sup>33/</sup> The 20 MHz bands would be limited to small business, women and minority businesses.

21. Mr. Murray supports the suggestions of NABOB, the MPC, and CalCell since they all recognize that identical treatment of the Designated Entities would extinguish opportunities for smaller minority firms. If the Commission fails to provide additional preferences to minority firms, there is a distinct possibility that minorities will be systematically

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<sup>31/</sup> Minority PCS Coalition Comments at 7 - 8.

<sup>32/</sup> CalCell Comments at 21 - 22.

<sup>33/</sup> CalCell Comments at 22.

disadvantaged against other Designated Entities, and will, as a result, receive little, if any spectrum through an auction mechanism. Such a result is plainly contrary to the Congressional mandate to provide "opportunity" to minorities.

**B. Granting Preferences Based On Race Would Not Violate the Constitution**

22. The Joint Comments of the Rocky Mountain Telecommunications Association and Western Rural Telephone Association and others suggest that a preference based on race and gender is unconstitutional. The better analysis is, however, presented by NAMTEC, the Cook Inlet Region, Inc., American Women in Radio and Television, and the Minority Business Enterprise Legal Defense Fund; all of which demonstrate that the Commission's preference will meet current constitutional standards.

23. Mr. Murray agrees with those who argue that intermediate review, as opposed to strict scrutiny, is the appropriate standard to apply to Congressional action mandating minority preferences.<sup>34/</sup> This standard applies because Congress

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<sup>34/</sup> See Metro Broadcasting v. F.C.C., 110 S.Ct. 2997 (1990); and Fullilove v. Klutznick, 448 U.S. 448 (1980). NAMTEC agrees that the preference program at issue is similar to the program which passed constitutional muster in Fullilove. In both cases Congress directed a federal agency to administer a preference program designed principally to ensure economic opportunity for members of minority groups. Both programs are premised on a lack of opportunity available to minority groups in the two fields, and both programs are to be administered on a national

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has developed an "institutional expertise" in the area of minority preferences, which is entitled to great deference from reviewing courts. The Commission's proposed preferences would satisfy both prongs of the intermediate scrutiny test since: (1) the minority preferences serve an important governmental purpose;<sup>35/</sup> and (2) the preferences are substantially related to that important government purpose.<sup>36/</sup>

24. The purpose of the Act was to enhance the economic opportunities for members of minority groups and women to participate in the telecommunications industry since these groups are currently under-represented. Cook Inlet Region and NAMTEC agree that past congressional findings provide a sufficient legal foundation for the Commission's preference policy. Both groups note that Congress has acted to correct similar under-representation in minority business ownership in the past. For example, NAMTEC notes that in a debate on a Department of Defense minority-owned business preference program, "sponsors of the legislation pointed to the disparity between the percentage of defense contracts going to minority businesses in 1985 (2.2 percent) and the percentage of military personnel from minority

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<sup>34/</sup> (...continued)

scope. NAMTEC comments at 9. See also Cook Inlet Region, Inc. Comments at 7 - 19; NABOB Comments at 2 - 3; MPC Comments at 5 - 6; and American Women In Radio and Television, Inc. Comments at 4 - 9.

<sup>35/</sup> See e.g. Cook Inlet Region Comments at 10 - 15.

<sup>36/</sup> Id. at 15 - 19.

groups at the same time (26.7 percent) as evidence that the preference was needed."<sup>37/</sup> Similarly, a Department of Transportation minority-owned business preference was introduced in 1982 "because minorities were, at that time, experiencing markedly greater unemployment" than the national average.<sup>38/</sup>

25. While the overall structure and basis of the preference is sound, the comments do suggest one important policy change. To ensure that the preferences are found to be narrowly tailored, NAMTEC and Cook Inlet Region, Inc. caution that the Commission must establish provisions for the "exemption" of non-legitimate Designated Entities (i.e., strict eligibility requirements) and "waiver" of set-asides where no qualified Designated Entities apply. For example, the Fullilove preference contained a waiver provision so that the minority participation goal would be waived when no qualified minority-owned businesses were available.<sup>39/</sup> In addition, NAMTEC recommends establishing procedures to release the set-aside spectrum blocks to general bidding if no qualified minorities apply to bid on the blocks.<sup>40/</sup> As these changes should further buttress the argument that the

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<sup>37/</sup> NAMTEC Comments at 10 [citing 131 Cong. Rec. H 4981, 4982-93 (daily ed. June 26, 1985) (statements of Reps. Savage and Conyers)].

<sup>38/</sup> NAMTEC Comments at 11 [citing 128 Cong. Rec. H 8954 (daily ed. Dec. 6, 1982) (statement of Rep. Mitchell)].

<sup>39/</sup> NAMTEC also notes that the Department of Transportation preference program was found to be narrowly tailored because it included specific provisions for "exemption" and "waiver." NAMTEC Comments at 13.

<sup>40/</sup> Id.

preferences are constitutional, Mr. Murray supports these comments.

**C. Minority Preferences Should Remain Separate From Those Accorded to Small Business**

26. Several groups, including the Devsha Corporation, the Association of Independent Designated Entities ("AIDE"), and others express opposition to a preference system that maintains and allocates spectrum based on the race and gender of the applicant. These parties would prefer the Commission to grant preferences based on an applicant's status as a small business or a rural telephone company. These groups assert that the only constitutional way to satisfy the congressional mandate to provide opportunities to women and minorities is to provide preferences to such applicants through the small business designation.

27. This alternate approach is not viable since it would almost certainly preclude both women and minorities from receiving licenses through an auction process. The comments submitted by rural telephone companies and small businesses reflect fundamentally different concerns and abilities than those of women and minorities. If all Designated Entities were given equal access to use economic preferences, women and minority applicants could not realistically compete with rural telephone companies and many "small businesses." These applicants would be completely dominated by larger, better financed Designated Entity competitors. No gender or racial group should have its

opportunity to participate in the division of a national public resource so systematically minimized.

28. The comments of PMN, Inc. unwittingly point out the problem Mr. Murray perceives. PMN asserts that all Designated Entities should be treated identically to create a "level playing field". However, a close reading of its comments reveals the flaw in this reasoning. PMN seeks to define "rural telephone company" using a size based definition that would include companies that have revenues of up to \$100,000,000.<sup>41/</sup> Clearly, this revenue flow far exceeds that of most minority businesses.

29. Furthermore, rural telephones companies receive financing from the Rural Electrification Administration. The rural telephone companies argue that this special financing should not have a bearing on any preferential treatment granted to them. The better argument, in Mr. Murray's view, is presented by the Richard Vega Group which contends that a rural telephone company must be precluded from using any source of financing within its bid package which is not available to another Designated Entity. This would include financing from the REA.<sup>42/</sup> NAMTEC similarly asserts that rural telephone companies should "not be permitted to use any REA funds for bidding related to up-front payments, deposits, or license costs."<sup>43/</sup> If rural

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<sup>41/</sup> PMN Comments at 8.

<sup>42/</sup> Richard Vega Group Comments at 7.

<sup>43/</sup> NAMTEC Comments at 19.

telephone companies are slated to compete directly with minority-owned firms for spectrum, Mr. Murray is compelled to agree with these limitations on rural telephone companies. The expansive definitions sought for "rural telephone companies" can only serve to undermine the opportunities offered to minorities.

30. Mr. Murray is similarly concerned about the negative effect of an expansive definition of "small business." Such a definition has been proposed by numerous groups.<sup>44/</sup> To qualify as a "small business" under current SBA regulations, an entity must have a net worth not in excess of \$6 million with average net income after Federal income taxes for the two preceding years not in excess of \$2 million. Many of the nations largest telecommunications companies which are not yet cash flow positive, including many major cellular companies and cable companies, would qualify as small businesses under this test. Also, since many communications businesses are not personnel intensive, several communications giants could meet the size standard for the radio telephone industry.<sup>45/</sup> Consequently, Mr. Murray must disagree with those, such as Tri-State Radio, who

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<sup>44/</sup> Tri-State Radio suggests that a \$50 million net worth standard "better reflects Congressional intent." Tri-State Comments at 8. The LuxCel group advocates allowing a business with a net worth of up to \$20 million to qualify as a small business. LuxCel Comments at 4. Suite 12 advocates including businesses with up to \$75 million in annual sales. Suite 12 Comments at 10 - 11.

<sup>45/</sup> Notice at n. 51; 13 C.F.R. §121,601. A company can have up to 1,500 employees and still qualify as a small business in this industry group.



argue that the SBA thresholds are too low given the "capital intensive nature" of the telecommunications industry.

31. If the Commission determines that small business must be defined more expansively to be competitive, then it should do so. However, the Commission should also recognize that most minority-owned firms will be unable to garner the same bidding resources as a firm with a net worth of between \$50 to \$75 million. Therefore, to avoid establishing a systematic competitive disadvantage for minority firms, the Commission must establish a mechanism for minorities to compete for spectrum separately from rural telephone companies and small businesses. Women and minorities will be denied their Congressionally mandated right to participate in PCS auction proceedings unless the Commission adopts a system of regulations which can "equalize" the relative positions of the Designated Entities. The most efficient way to do this is to create a separate block of spectrum specifically for minorities. If such a mechanism cannot be adopted, Mr. Murray would support the suggestion by Cook Inlet Region which would award preferences, regardless of race or gender, to businesses owned by entities which are economically disadvantaged in the telecommunications industry.<sup>46/</sup>

32. Towards this same end, some limits should be imposed on small business consortia. For example, Tri-State advocates that small businesses should be able to form consortia with other entities without losing their status as a Designated

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<sup>46/</sup> Cook Inlet Region, Inc. Comments at iv.